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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 177

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER,

vs.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, BERTHA KADRIE, MAILIVAN E. KADRIE, MARIE KADRIE, DOROTHY KADRIE, ELMER KADRIE, AND OMAR KADRIE, BY THEIR NEXT FRIEND, MOTHER, AND NATURAL GUARDIAN, SARAH KADRIE, RESPONDENTS.

RESPONDENTS' OBJECTIONS TO THE GRANTING OF THE WRIT OF CERTIORARI.

WEBSTER BALLINGER,
Attorney for Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 877

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER,

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, BERTHA KADRIE, MAILIVAN E. KADRIE, MARIE KADRIE, DOROTHY KADRIE, ELMER KADRIE, AND OMAR KADRIE, BY THEIR NEXT FRIEND, MOTHER, AND NATURAL GUARDIAN, SARAH KADRIE, RESPONDENTS.

RESPONDENTS' OBJECTIONS TO THE GRANTING OF THE WRIT OF CERTIORARI.

The petiton for certiorari (pp. 11-12) states no sufficient grounds to justify this Court in granting the writ. No other judgment could have properly been entered by the court below on the record before it.

The questions which petitioner seeks to have this Court review all relate to the construction of a pro-

vision of an agreement governing the distribution of a trust fund created for the Chippewa Indians in the State of Minnesota and their *issue*. The decision and judgment of the court below affirmed a construction of said provision adopted by the officers and agents of the Department immediately following the execution and approval of said agreement on March 4, 1890, uniformly followed thereafter with the acquiescence and approval of the Indians for thirty-seven years, or until January 8, 1927, and under which the greater portion of the trust fund was distributed.

The learned opinion of the Court of Appeals (R. 72-7) recites only such facts as the Court deemed necessary for the purposes of decision. A statement of the facts disclosed by the record will greatly aid in disposing of petitioner's Specifications of Error (R. 10-11) and Reasons for Granting the Writ (R. 11-12).

Statement.

Prior to January 14, 1889, there were eleven bands or tribes of Chippewa Indians occupying ten separate, widely scattered reservations in the State of Minnesota (H. R. Ex. Doc. 247, 51st Cong., 1st Session; R. 29). By the Act of January 14, 1889 (25 Stat. at L. 642; R. 25-28) the United States submitted a proposal to all the different bands or tribes of Chippewa Indians in the State of Minnesota for the dissolution of their tribal governments and the division of their then tribal property among the *then members of said tribes or bands and their issue*. The Act authorized the President of the United States, through a commis-

sion, to enter into negotiations with all of said bands or tribes, and to conclude agreements with them upon certain express terms therein set out, which terms contained detailed instructions with perfect limitations for the disposition of every acre of the then existing tribal or band reservation lands and timber, and of every dollar of the net proceeds to be received therefrom. The plan submitted in the proposal provided—

(*a*) For the preparation by the Commission of "*an accurate census of each band or tribe,*" in order to determine whether the proper number of Indians gave their assent to the proposed plan, "and for the purpose of making the *allotments* and money payments" set out in the proposal, said census to be made while the commission was engaged in negotiating the agreements, and was to be completed before the agreements were executed (Section 1, R., 26).

(*b*) For the setting aside for allotment purposes of sufficient land on the White Earth Reservation to allot all of the then members of the different bands or tribes as shown by said census rolls, except those residing on or belonging to the Red Lake Reservation, and the setting aside on the Red Lake Reservation for allotment purposes of sufficient land to allot the then members of the Red Lake Band as shown by the census of that band (Section 1, R., 26).

(*c*) For the cession to the United States, in trust, of all lands of said Indians embraced in all existing reservations, except the lands set aside and reserved for allotment purposes on the White Earth and Red Lake Reservations (Section 1, R., 26).

(*d*) For the allotment in severalty of land to each member of the Red Lake Band as shown by said census rolls out of the lands reserved for allotment purposes on the Red Lake Reservation; all the members of all the other different bands or tribes as shown by said census rolls were to be removed to the White Earth Reservation, where they were required to take up their residence, and after having done so, were to be allotted lands in severalty out of the lands reserved for allotment purposes on that reservation.

(*e*) Any Indian residing on any of the ceded reservations was to be permitted to take his allotment in severalty out of the ceded lands on the reservation where he lived at the time the other Indians were removed to the White Earth Reservation (Section 3, R. 27). The Indians who had received allotments on any of the reservations were not to be deprived thereof or disturbed therein, except with their individual consent (Section 1, R. 26).

(*f*) The ceded lands were to be classified, appraised and sold (R., 27), and the net proceeds received therefrom were to be deposited in the Treasury of the United States "*to the credit of all the Chippewa Indians in the State of Minnesota*" as a permanent fund, which should draw interest at the rate of 5 per cent per annum, payable annually for the period of fifty years. One-half of the interest annually accruing on the principal fund was to be paid annually in cash, in equal shares "to the heads of families and guardians of orphan minors for their use," and one-fourth was to be paid annually "in

> cash, in equal shares per capita to all other classes," and at the expiration of the fifty-year trust period, the permanent fund was to be divided and *"paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."* (Section 7, R., 28.)

The report of the House Committee on Indian Affairs on the bill that became the said Act of January 14, 1889, contained the following statement of the intent and purpose of said legislation:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *" (R., 28).

Agreements were entered into with all of the tribes or bands embodying the plan set out in the Act of January 14, 1889, said act being incorporated in each agreement either in its entirety or by reference. They were executed by two-thirds of the male adult members of each band or tribe as shown by the census rolls, on behalf of the Indian tribes or bands, by the commissioners representing the United States, as required by said act, and on March 4, 1890, approved by the President of the United States, and as expressly declared in said Act of January 14, 1889, thereupon "took effect" (R., 29).

Following the execution and approval of said agreements, all of the members of the various tribes or

bands, exclusive of the Red Lake Band, were either removed to the land set aside for allotment purposes on the former White Earth Reservation, where they established their residence, and were there allotted land, or were permitted to take their allotments out of the ceded lands which were part of the former reservations upon which they resided (R., 29). By the Act of June 21, 1906, all restrictions were removed from allotments made out of the lands reserved for allotment purposes on the former White Earth Reservation then and thereafter held by adult mixed-blood Indians (R., 29-30). Since March 4, 1890, there have been *no band or tribal governments, chiefs, or councils, and no Indian reservation in Minnesota,* except the Red Lake Reservation created under the Act of February 20, 1904 (R. 42-44.)

Immediately following the approval of the agreements, and as a basis for the distribution of the interest annually accruing on the principal fund and the ultimate division of the principal fund under Section 7 of said agreements, the officers and agents of the Department, before each annual payment was made, revised the original rolls made by the Commission under the Act of January 14, 1889, by striking therefrom the names of all persons appearing thereon who had died since the preceding annual payment was made, and adding thereto the names of all children born since the last annual payment was made to parents whose names appeared on said rolls, irrespective of where the child was born. In adding the names of the newborn children, proof was only required that the new-

born child was a child of an enrolled parent. No inquiry was made as to the place of birth of the child (R., 39-44).

Immediately following the approval of the agreements, the Department construed the language appearing in Section 7 of said Act of January 14, 1889, as embodied in the agreements, viz:

> "One-half of said interest shall, during the said period of fifty years, except in cases hereinafter or otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use,"

as authorizing a payment *per capita* and not *per stirpes*. In 1896 a question was raised as to whether the one-half of the interest money should be paid *per stirpes* and not *per capita*. October 15, 1896, the question was referred to the Comptroller of the Treasury Department, who, under date of October 21, 1896 (3 Comp. Dec., 158) held in part as follows:

> "The question now raised particularly relates to the provision that one-half of the interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth of said interest shall be annually paid in cash in equal shares *per capita* to all other classes. * * *
>
> "In reference to this clause the commission who negotiated this treaty said:
>
> " 'The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to us

obscure, inasmuch as it says "one-half of said interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of Indians," etc., and as we could neither explain this to the Indians or comprehend it so as to give it such an interpretation as would do equal justice, we promised the cash payment should be made *per capita* in equal shares.' (House Ex. Doc. No. 247, p. 24, Fifty-first Congress, first session.)

"With their statement as to the obscurity of this legislation, I fully agree, and inasmuch as this practice of making equal *per capita* payments has been uniformly followed since the passage of this act, I do not feel justified in making any other construction than that given contemporaneously with the inauguration of the enforcement of the act. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act." * * *

No payments from the principal fund or interest arising thereon have ever been made *per stirpes*, but all have been made *per capita* to persons whose names appeared upon the money-payment roll (R., 38).

Mary Blair, grandmother of respondents, a recognized and enrolled member of the White Earth Band of Chippewa Indians, established her residence upon and was allotted land out of the lands reserved for allotment purposes on the former White Earth Reservation.

In the year 1892 there was born to Mary Blair at Richwood, Minnesota, in lawful wedlock, a child, Sarah Cogger, now Sarah Kadrie. Following her birth, she was enrolled, and her name has ever since remained on said rolls and she has at all times subsequent thereto received a per capita share of all money payments thereafter made (R., 29).

Following the approval of said agreements, on March 4, 1890, and until January 8, 1927, the *uniform practice* was to enroll all children and grandchildren of those persons who were members of the various bands or tribes, and whose names were inscribed on the census rolls prepared by the Commission under Section 1 of said Act of January 14, 1889. *That the new-born child was the issue of an enrolled ancestor was the only requirement to enrollment for money payments under Section 7 of said Act and agreements* (R., 39, 40, 41, 42, 43, 44).

In 1909, Sarah Cogger married Mall Kadrie, a naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie, in lawful wedlock, the following children, on the following dates and at the following places (R., 30):

Name.	Date.	Place of birth.
Mary I. Kadrie	1/10/10	Canada
Evelina "	5/11/11	"
Amit K. "	3/30/14	"
Bertha "	3/31/16	"
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minn.

Following the births of the first three children, their names were inscribed upon the money-payment rolls by the officers and agents of the United States (R., 30), in conformity with the established practice (R., 39-44).

Following the birth of Bertha, the fourth child of Sarah Kadrie, application was made for her enrollment at the White Earth Agency. The application was transmitted to the Commissioner of Indian Affairs July 11, 1916 (R., 30). July 20, 1916, the application was returned to the Superintendent for investigation (R., 31). July 28, 1928, the Superintendent reported that Bertha was a child of Sarah Kadrie, who was of three-eighths Indian blood; that the mother, Sarah Kadrie, married a white man, and "left the reservation several years ago"; that the child was born in Winnipeg, Manitoba, Canada, "among the white people"; that Sarah Kadrie was the same person who made a claim for back annuities due Evelina, her second child, which was disallowed June 24, 1916, for the reason that the child was born of a white father, away from the White Earth Reservation, and that the parents had not lived among or affiliated with the Indians of said reservation since its birth. The Superintendent

recommended the disallowance of the application under paragraph 324 of the regulations issued under the Act of June 7, 1897 (30 Stat., 90, R., 31). August 2, 1916, the Indian Office approved the recommendations of the Superintendent (R., 32).

At about the same time the above action was taken in the case of Bertha, and in the year 1916, the Superintendent located at White Earth, and in charge of the money-payment rolls, recommended to the Indian Bureau that the names of a number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed on the money-payment rolls be stricken therefrom on the stated ground that under said regulations issued under said Act of June 7, 1897, and the opinion of the Circuit Court of Appeals in the case entitled Oakes *v.* United States (172 U. S., 305), they were not entitled to have their names on said rolls and to receive distributive shares of the money payments from the trust estate as they had not been born to membership in the tribe, had not affiliated with, and had not been recognized by the tribe as members thereof. The Indian Bureau concurred in the recommendations of the Superintendent, and directed that the names of said children be stricken from the money-payment rolls, which orders were carried into effect (R., 34).

Sarah Kadrie, mother, natural guardian, and next friend of Mary I., Evelina and Amit K. Kadrie, petitioned the Secretary of the Interior for a revocation of the order of the Indian Bureau under which the names of her minor children had been stricken from said money-payment rolls (R., 34, 35). Similar peti-

tions were filed by the Indian parents or ancestors of the other children whose names had been stricken from said rolls by like orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case, and was referred to the then Solicitor for the Department for an opinion determinative of the rights of all (R., 35). On February 17, 1919, the Solicitor rendered an opinion (R., 46-51) reversing the action taken by the Indian Bureau in all the cases and directing the restoration to the rolls of the names of respondents and all other Indian children of like status. As to the rights of respondents, the Solicitor (R., 50, 51) held:

> "In the particular case giving rise to a call for this opinion, Sarah Kadrie, née Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from

the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused.

"In my opinion, this action was erroneous, and should be corrected. Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning, or failing to acquire. residence on the Indian reservation or with the tribe."

Thereupon the names of Mary I., Evelina and Amit K. Kadrie were restored to said rolls, and the names of the other six children of Sarah Kadrie were placed upon said rolls following their births, and all of them received their distributive shares of all money payments made prior to October 1, 1927 (R., 35), including one-fourth of the principal trust fund which was distributed under the Act of May 18, 1916 (39 Stat. at L., 123 at 135), and other distributions thereafter made of the principal fund from time to time prior to October 1, 1927.

The opinion of the Solicitor rendered February 17, 1919, was adhered to in all cases of enrollment of newborn children down to January 8, 1927. Between 1916 and 1919, during which period the names of many Indian children were stricken from the rolls by orders of the Indian Bureau, reversed by the Solicitor's opinion of February 17, 1919, and thereafter reinstated, payments had been made to the Chippewa Indians in

which said children, as well as other children born during said period and of like status, did not participate solely because their names had been stricken or omitted from the money-payment rolls. To enable the Secretary to pay said children the shares to which they were entitled under said opinion of February 17, 1919, Congress enacted the act approved April 14, 1924 (43 Stat., at L., 95; R., 35, 36). By this act, the Secretary was "authorized to pay, out of any moneys belonging to the Chippewa Indians of Minnesota, such amounts as he may find due any persons of Chippewa blood *whose names may have been erroneously omitted or stricken from the Chippewa annuity rolls, or who may have been* or may hereafter be *found entitled to enrollment for annuity payments authorized by Section 7 of the Act of Congress approved January* 14, 1889" (R., 35). Under the authority contained in said act, all Indian children who were either refused enrollment, or whose names were stricken from said money-payment rolls, during the period from 1916 to February 17, 1919, were paid the shares in all money payments made during said period to which they were entitled under the Solicitor's opinion of February 17, 1919, (R., 35).

January 8, 1927, the solicitor for the Department of the Interior rendered an opinion in the case of Jane B. Andrews, applicant for enrollment on the money-payment rolls of the Chippewa Indians of Minnesota (R., 37, 51-70), in which he overruled the practice that had at all times theretofore obtained since March 4, 1890, his predecessor's opinion of February 17, 1919 (R., 70), confirmed by Act of April 14, 1924 (R., 35).

adopted the ruling which the Indian Bureau attempted to establish in 1916, and held, in substance, that a right to share in the money payments under Section 7 of the Act of 1889 and the agreements entered into thereunder, was dependent upon *"tribal membership, tribal affiliation, recognition and residence on an Indian Reservation"* (R., 69).

Following said opinion of January 8, 1927, citation was issued upon Sarah Kadrie, next friend, mother and natural guardian of respondents, requiring her to show cause why the names of respondents, her children, should not be stricken from the money-payment rolls. Thereafter, and in due course, Sarah Kadrie made answer to said citation, setting out the descent of appellants from an enrolled parent, their Indian blood, previous enrollment, and alleging that as their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, they could not further be inquired into by the Secretary. On October 1, 1927, the then Secretary of the Interior signed an order (R., 37, 38), in part as follows:

> "From a consideration of all the facts in this case, which are not being recited, but are contained in the record, it is clear that these children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes *et al. v.* United States (172 Fed. Rep. 305), and the prac-

> tice of the Department prior to the Mahaffie opinion of February 17, 1919. Therefore the names of Mary I., Evelina, Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer and Omar Kadrie are hereby stricken from the rolls of the Chippewa Indians of Minnesota. You will make proper notation on the records of your office."

November 21, 1927, formal notice was given all the Chippewa Indians of Minnesota by the department that "all further distributive shares of the money payments to any person enrolled under the opinion of February 17, 1919, will be withheld and suspended, pending further departmental action" (R., 38.)

Thereupon respondents (R. 2-12) petitioned the Trial Court for a writ of mandamus, requiring petitioner's predecessor to restore their names on the supplemental rolls of the Chippewa Indians of Minnesota, and to pay them their *per capita shares* in all future payments thereafter made under the authority contained in Section 7 of the agreements approved March 4, 1890, and for general relief. The Secretary answered (R. 13-19), and the case was heard upon the record now before this Court. March 29, 1928, the Trial Judge filed an opinion (R. 20), in the following words:

> "On the whole I am inclined to agree with the opinion of the Solicitor of the Department in the Patterson opinion, and therefore the petition will be dismissed. I am influenced also by the fact that the Secretary of the Interior has a wide discretion in determining questions of law as well as of fact."

Judgment was thereupon entered in conformity with said opinion, objections and exceptions being noted, and appeal bond filed. After the appeal had been perfected, the Trial Judge expressed a desire to reconsider his opinion. I quote from page 33 of Petitioner's Brief filed in the Court of Appeals:

> "Some time after his decision was filed the Trial Judge suggested that if any appeal had not been perfected he would consider a motion for rehearing. The appeal had been perfected."

Since the names of respondents were stricken from the roll by order of the Secretary dated October 1, 1927 (R., 37-8), and subsequent to the institution of this action, Congress by the Act of March 15, 1928 (Public No. 172, 70th Cong.), directed a further distribution of the principal fund.

ARGUMENT.

Let us now consider the errors assigned and relied upon by Petitioner.

Assignments 2, 3 and 4 are interrelated and may properly be considered together.

Assignments of Error 2, 3, and 4.

Assignments 2, 3 and 4 (R., 10) are in substance that the Court below correctly held that respondents were entitled to share in the division of the *corpus* of the trust at the expiration of the fifty-year trust period, but that the Court erred in holding that as respondents

were the lineal issue of a Chippewa Indian duly enrolled as such on the census rolls made by the Commission under the Act of January 14, 1889, they were entitled to share in the interest annually accruing on the *corpus* of said fund during the fifty-year trust period.

Thus the only question presented by these three assignments is as to the right of respondents to share in the distribution of the *interest* annually accruing on the trust fund. Their right to equal distributive shares of the *principal* of the fund when and as distributed is conceded. As the greater portion of the principal fund has already been distributed under Acts of Congress, the rolls from which respondents' names were stricken being the sole basis for all payments of interest and distribution of the principal (R. 35), and as respondents have been denied any participation in the last payment from the principal (Act of March 15, 1928) solely because their names did not appear on the money payment rolls, it is apparent that the contention now made by petitioner is raised for the first time in the thirty-nine years during which payments have annually been made.

Counsel for Petitioner (Pet. pp. 14-17) in their Brief (Pet. 15) elucidates these three assignments. It is conceded that the distribution of the interest annually accruing on the principal fund during the fifty-year trust period is governed exclusively by Section 7 of the Act of January 14, 1889 (R. 28), as embodied in the agreements (R. 29). It is contended (Pet. 15) that as one-half of the interest annually accruing is to be

paid in cash, in equal shares to "heads of families and guardians of orphan minors," and one-fourth is to be paid in equal shares *per capita* to all other classes of Indians, respondents must bring themselves within one of said classes. No payment from the principal of the trust fund or interest arising thereon has ever been made *per stirpes,* all payments having been made *per capita* (R. 38). This practice was adopted when the the first interest payment was made, pursuant to the construction of Section 7, *supra,* by the Commission while negotiating the agreements, and which construction was accepted and relied upon by the Indians. It was approved by the Comptroller by decision dated October 21, 1896 (3 Comp. Dec. 158). (See Statement of Facts.) Immediately following the approval of said agreements on March 4, 1890, the officers of the Department, before each payment was made took the original census rolls prepared by the Commission, struck off the names appearing thereon of persons who had died, and added thereto the names of the *lineal issue* of all persons enrolled on the census rolls, *irrespective* of where the issue were born, tribal recognition, or affiliation; all reservations, tribal officials and tribal governments having disappeared with the approval of the agreements on March 4, 1890, (R. 39-44). This practice continued for twenty-six years or until 1916 when it was set aside by the Indian Bureau (R. 32), and was restored by the Solicitor's Opinion of February 17, 1919 (R. 46), and the action of the Indian Bureau vacated. Following the Solicitor's Opinion, Congress by the Act approved April 14, 1924, author-

ized the Secretary to pay such amounts as he might find due any person who had been erroneously omitted or stricken from the rolls (R. 35), and under this authority the Secretary enrolled and restored to the rolls those persons whose names had been stricken therefrom or who had been denied enrollment under the action taken by the Indian Bureau in 1916, and prior to the Solicitor's Opinion, including respondents (R. 35). The Solicitor's Opinion of February 17, 1919, remained in full force until January 8, 1927. Thus the issue of the original enrollees born between March 4, 1890, and January 8, 1927, *irrespective* of the place of their birth, tribal recognition or affiliation, were enrolled and received their distributive shares of all interest payments and payments from the principal fund. Respondents come within this class. Thus the practice of making all payments *per capita* and of enrolling all issue of original enrollees and paying them *per capita* shares in all money payments was adopted immediately following the approval of the agreements and continued in full force for thirty-seven years thereafter. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act. Edwards's Lessee *v.* Darby, 12 Wheat. 206; Brown *v.* United States, 113 U S., 568; United States *v.* Hill, 120 U. S 169-182; United States *v* Healey, 160 U. S. 136; Wisconsin *v.* Illinois (decided Jan. 14, 1929, by this Court).

The question now assigned as error was not raised by petition, answer, evidence or argument in the Trial Court. In the Trial Court, respondents here, petitioners there, asserted an absolute right under Section 7 of the Act of January 14, 1889 (R. 28), as embodied in said agreements (R. 29) to enrollment on the rolls maintained by the department as a basis for all money payments, and to equal *per capita* shares in all distributions of interest annually arising on the principal fund and of the principal fund, by reason of the fact that they were the *lineal issue* of a member of one of the former bands of tribes regularly enrolled on the census rolls (R. 5, 7-8), following the Solicitor's Opinion of February 17, 1919 (R. 46, at 50-1), and the practice that had theretofore prevailed. Petitioner here, respondent there, denied the claimed rights on the stated ground (R. 14, 17), that being the *lineal issue* of an enrolled ancestor did not in itself entitle respondents to enrollment and to participation in the division of the fund "because they were born away from the Indian reservation, tribal relation, and under conditions showing that their parents had abandoned the habits and customs of their Indian tribesmen and adopted those of civilized life," following the Solicitor's Opinion of January 8, 1927 (R. 51 at 69). Upon this issue the case was tried.

As assignments 2, 3 and 4 present questions not disclosed by the record and not considered by the Courts below this Court will not review them.

Edward Hines Yellow Pine Trustees *v.* Martin, 268 U. S. 458, 465.

Assignments of Error 5, 6, 7, and 8.

Assignments 5, 6, 7 and 8 may be properly considered together. Section 7 of the Act of January 14, 1889, as embodied in the agreements designated the original enrollees and *their issue* as the sole beneficiaries of the money payments. The Secretary found as a fact that respondents are the issue of an original enrollee. When he indentified them as such, his discretion was exhausted, and there remained merely the performance of the ministerial duty of paying respondents their *per capita* shares of the money payments. United States *ex rel.* Besaw *v.* Work, 6 Fed. (2d) 694; Work *v.* United States *ex rel.* Gouin, 18 Fed. (2d) 820; Ballinger *v.* Frost, 216 U. S. 240; Lane *v.* Hoglund, 244 U. S. 174; Work *v.* Mosier, 261 U. S. 353.

The record discloses that the Department maintained certain rolls used as a basis for all payments made to the Chippewa Indians under Section 7, *supra.* Petitioner, or his predecessor, by order dated August 29, 1927 (R. 38), directed that the names of respondents should be "stricken from the rolls of the Chippewa Indians of Minnesota." By striking the names of respondents from said rolls they were denied all right to share in either the interest payments or the payments from the principal fund. The judgment of the Court below directing the restoration of the names of respondents to said rolls and requiring petitioner to pay them their *per capita* shares in all future payments was therefore proper.

No Valid Reason Assigned for Granting the Writ.

The question decided by the Court of Appeals relates exclusively to the Chippewa Indians of Minnesota. It has no application to any other Indians. The ruling of the Court confirms a practice that prevailed for thirty-seven years in the administration of the trust fund, and under which the greater portion of the *corpus* of the fund has been distributed. A reversal, at this late day, of the long-established practice would raise a question as to the liability of the United States for all the money distributed under the former practice.

The question raised by the petition presents only a diversity of opinion between two former Solicitors of the Department. The Trial Judge after entering the judgment in the Trial Court sought an opportunity to reconsider the matter. The case had then passed beyond the control of the Trial Court, and the mistake was corrected by the Court of Appeals.

The decision and judgment of the Court of Appeals is so manifestly proper that a review by this Court would be useless.

For the above and foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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